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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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BRIAN CHRISTOPHER REED
VS.
STATE OF TEXAS

FROM THE WACO THE COURT OF APPEALS
Cause No. 10-18-00032-CR

Appeal from the 361ST Judicial District Court of
Brazos County, Texas
Cause No. 14-01090-CRF-361

APPELLANT BRIAN CHRISTOPHER REED'S REPLY TO THE STATE'S PDR

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STATEMENT REGARDING ORAL ARGUMENT

Argument is not necessary on a petition for discretionary review which should be refused.

STATEMENT OF THE CASE

Appellant was indicted on March 8, 2014, alleging that, on or about October 3, 2013, he did then and there, intentionally or knowingly cause the penetration of the sexual organ of M.K. by defendant's sexual organ, without the consent of M.K. (C.R. 4-5).

Trial was to the jury. Appellant was convicted on September 18, 2019 of the lesser included offense of attempted sexual assault. On September 19, 2019, the jury assessed punishment by confinement in the Texas Department of Correction- Institutional Division for three-years and six months. (C.R. 63-67).

STATEMENT OF PROCEDURAL HISTORY

On August 26, 2020, the Tenth Court of Appeals reversed the conviction and remanded the case for a new trial due to jury charge error for which Reed suffered egregious harm. *Reed v. State,* ___ S.W.3d ___, No. 10-19-00363-CR, 2020 Tex. App. LEXIS 6865 (Tex. App. – Waco, 2020, pet. filed). Chief Justice Gray dissented.

The State did not seek rehearing in the court of appeals. The State timely filed its petition for discretionary review. Reed now files his reply to that petition under the TEX. R. App. P. 68.9.

REPLY TO GROUND FOR REVIEW

Reed suffered egregious harm from the jury charge error which allowed conviction for a lesser included offense.

SUMMARY OF THE ARGUMENT

Appellant is entitled to a jury charge that accurately states the law applicable to the case and applies that law to the allegations of the indictment and the facts of the case. In addition to instructing the jury on the charged offense of sexual assault – specifying Appellant's penetration of the Complainant's sexual organ with his sexual organ, the charge also instructed the jury on a lesser included offense of attempted sexual assault without limiting it to penetration by his sexual organ. Neither Appellant nor the State requested or objected to the inclusion of the lesser included.

The court of appeals correctly concluded that inclusion of the lesser included in the charge was error charge; and, after conducting a proper *Almanza* review, the Court determined that error caused Appellant to suffer egregious harm. The State does not challenge the appeals court holding that the charge was erroneous, but contends that the error resulted in 'no harm' to Appellant.

The court of appeals reached the correct result and review is unnecessary.

Relevant Facts

College Station Police Detective Rick Vessel initially met with the Complainant at the College Station Medical Center around 4:30 a.m. on October 3, 2014. He described her as definitely intoxicated, with slurred speech and odor of alcohol. (R.R. Vol. III, 96-97).

Having obtained information that the alleged assailant was named Brian and might be staying at the Hilton, Vessel went to the Hilton and interviewed Appellant in his room. (R.R. Vol. III, 99, 103).

The interview was recorded and the recording was admitted into evidence and published to the jury. (SE#8). Initially, Appellant claimed he was only there a few minutes and remained downstairs. After further questioning, Appellant admitted he had come upstairs but denied having a sexual encounter. (R.R. Vol. III, 104-111).

When pressed, Appellant admitted he had gone upstairs to the bathroom and found Complainant on the floor. He stated that she had had too much to drink for her birthday. He claimed he helped her up and took her to her room. Once in the bedroom, he claimed he performed oral sex on her. He denied penetration. He contended that the sex was consensual. (R.R. Vol. III, 111-114).

Appellant had reported to the SANE nurse that she had a tampon in her vaginal; the pelvic exam found nothing. (R.R. Vol. II, 217).

Vessel told Appellant that Morgan had a tampon pushed up in her vagina. When pushed by Vessel that for the tampon to get pushed up into her there must have been intercourse, Appellant repeatedly denied anything but oral sex. After continual questioning regarding the false claim of a tampon, Appellant replied that his penis may have touched her. (R.R. Vol. III, 112-139; SE#8).

Mathew Newton. a College Station Patrol Officer, took the Complainant's statement. She was intoxicated. She told him that she woke up, pushed some guy off her

and went to Caitlin's room and told Caitlin that there was some guy in her room.(R.R. Vol. IV, 59-63).

Caitlyn Scott testified that, on October 2 2013, she and some other female friends celebrated Complainant's birthday. They drank a lot through the evening and ended up at The Tap where they met up with a group of men who were in town attending a course at the fire school, one of whom was Appellant. (R.R. Vol. III, 16-18, 21).

In her statement to police, she claimed that Trevor and Brian came to the apartment. She further testified that she did remember the 'other guy' asking to use the restroom and going upstairs. The restroom was across the hall from Morgan's bedroom. (R.R. Vol. III, 23-26).

Caitlyn testified that at some point later, she heard that caused her to go upstairs and check what was going on. She knocked and then opened Morgan's door and saw the guy with his shirt off either next to the bed or sitting on the edge of the bed. He said he was sorry. Catlyn testified that she then pushed him out of the apartment, yelling at him to get 'the fuck out of the house". (R.R. Vol. III, 26-27, 29).

Ms. Scott acknowledged that, when Appellant initially went up to the bathroom, Morgan may have been in there throwing up. (R.R. Vol. III, 45).

Complainant, testified that, on October 2, 2013, while a student at A & M, she and a few friends went out to celebrate her 23rd birthday. The group began the night eating and drinking alcohol at Wings N More and continued drinking through the night ending up at The Tap. She was highly intoxicated and was driven home by a friend. (R.R. Vol. IV, 7-12).

Once back home, she went to bed. She could not specifically recall what she wore to bed but knew she always slept in a particular shirt with either panties or pajama pants. When she woke up, she had someone in her room on top of her and no panties on. She recalled that she called for Caitlin and pushed the man off. (R.R. Vol. IV, 13-14).

On cross, she listed her drinks: at Wings N More she had at least two 32 ounce drinks containing "all sorts of liquor," at The Corner Bar she had a shot, and then she continued drinking sprite with vodka and grenadine and then beer at The Tap beginning sometime after 10:00 until about 1:30 a.m. (R.R. Vol. IV, 25-26, 30).

She testified that when she went home, she went straight to bed. She denied that Caitlin found her in the bathroom. She could not specifically recall walking up the stairs, opening her bedroom door or changing her clothes. She denied ever going into the bathroom, telling the jury that she would have remembered that. She did not recall testing Caitlin at 3:25 a.m. asking her, "can you come up here, please."(R.R. Vol. IV, 28, 29-30).

When called back to the stand, Ms. Keys was asked by defense counsel if she was adamant that the incident described by Caitlin Scott wherein she helped her up from the bathroom floor to the room did not happen or if she did not recall such an incident, she responded that she did not recall. And, confirmed that there were things from that night she did not recall. (R.R. Vol. IV, 131-132).

CSPD Officer Steven Taylor interviewed Caitlin Scott in the early morning following the incident. Caitlin was intoxicated. Caitlin told him that when they returned from the bar, Complainant went upstairs to her bedroom and collapsed in the bathroom and Caitlin helped her to her bed. (R.R. Vol. IV, 44-54).

Mathew Newton. a College Station Patrol Officer in training at the time of the incident, arrived at the apartment with Officer Clark about 4:15 a.m. He took the Complainant's statement. She was intoxicated. She told him that she woke up, pushed some guy off her and went to Caitlin's room and told Caitlin that there was some guy in her room.(R.R. Vol. IV, 59-63).

On cross, he confirmed that the Complainant told him that the guy had his penis in her. (R.R. Vol. IV, 67).

Appellant testified that he was in town to attend training for his job at Valero. He went out drinking with some other participants, including Trevor Allen, to the hotel bar, Buffalo Wild Wings, a Mexican food restaurant and The Tap. (R.R. Vol. IV, 77). He admitted he did not initially level with Detective Vessel. (R.R. Vol. IV, 79).

He testified that he and Trevor went to some apartment to see a woman Trevor met that night and when he went upstairs to the rest room, there was a lady lying on the floor and vomit in the toilet. He helped her up and when he was taking her to her room, she kissed his neck. Once in her bedroom she removed her clothes and "one thing led to another". (R.R. Vol. IV, 80-81).

He testified that he performed oral sex on her and she was awake throughout. He denied she resisted until "she picked up my head and she got up and left." Then her roommate came in and told him to get the fuck out of the house. (R.R. Vol. IV, 82).

ARGUMENT

THE APPEALS COURT PROPERLY CONCLUDED THAT THE INCLUSION OF AN ERRONEOUS INSTRUCTION ON ATTEMPTED SEXUAL ASSAULT RESULTED IN EGREGIOUS HARM.

Appellant was indicted for sexual assault, specifically penetrating Complainant's sexual organ with his sexual organ. (C.R. 4-5). As set out in the facts above, the Complainant testified that she woke up to find Appellant on top of her with his penis inside her. (R.R. Vol. IV, 41). Evidence was also admitted of a recorded statement of Appellant wherein he claimed he performed oral sex on Complainant with her permission and he testified to the same. (R.R. Vol. III, 104-111; SE#8; R.R. Vol. IV, 82). The application paragraph of jury charge authorized conviction for attempted sexual assault without limiting it to attempted penetration of the Complainant's sexual organ by Appellant's sexual organ. The jury convicted Appellant of the lesser included offense of attempted sexual assault. (C.R. 63-67).

The application paragraph given to the jury for the offense of sexual assault were that the Defendant:

(1) On or about October 3, 2013,
(2) Did cause the penetration of the sexual organ of M.K.
(3) By the defendant's sexual organ
(4) Without the consent of M.K. (C.R. 43).

The application paragraph given to the jury for the lesser included offense of attempted sexual assault was that the defendant:

(1) On or about October 3, 2013
(2) With specific intent to commit the offense of Sexual Assault

(3) Did an act which amounted to more than mere preparation that tended but failed to effect the commission of the offense intended. (C.R. 44).

Additionally, and importantly, the jury was instructed that, "it is no defense to criminal attempt if the Sexual Assault was actually committed." (C.R. 44). Thus, the charge allowed for a conviction of the lesser included in the event the jury believed the oral sex included penetration and the Complainant did not consent.

Sexual assault was defined in the jury charge, in relevant part, as intentionally or knowingly causing the penetration of the anus or sexual organ of another person ***by any means***, without the person's consent. (emphasis added) (C.R. 42).

The State's conclusion that the jurors understood a conviction for the lesser included required an attempt to penetrate with Appellant's penis has no basis.

The State contends that the Court of Appeals erred in finding egregious harm "where the jury understood that a conviction for the lesser included offense of attempted penetration of the victim's sexual organ by Appellant's sexual organ". Appellant refutes that characterization of the record.

If the jury did not believe that the State had met its burden as to every element of the charged offense, it was instructed to then consider Attempted Sexual Assault, which was erroneously defined in the charge. (C.R. 43). It is only after considering and rejecting the Sexual Assault offense, defined as penetration by the Defendant's sexual organ, that

the jury was permitted to consider Attempted Sexual Assault which was not limited to penetration by the Defendant's sexual organ.

All that is clear regarding the jury's understanding, is that they did not believe the State's version of events beyond a reasonable doubt as proffered primarily through the testimony of Complainant and those to whom she made an outcry. Otherwise, they would not have rejected the charge of sexual assault.

According to the Complainant herself, she had consumed massive amounts of alcohol and was admittedly highly intoxicated. As set out above, she was unable to recall particular events from the evening in question, such as how she got home and what she was wearing when she went to bed. In addition, she was mistaken about some significant matters: she claimed that she had gone to bed with a tampon and it had been pushed up into her from the alleged penal intercourse; she denied being picked up off the bathroom floor and put to bed by her roommate. It is no great stretch to conclude that the jury had some doubts about her ability to recall and related the events of that night. So, did the jurors believe the Complainant's version in all regards except that the Appellant did penetrate her? Or did they believe Appellant's version except did not believe the complainant did or was able to consent due to her intoxication? It is important to note that, although Appellant stated to Vessel and testified that the Complainant was a willing participant, with her acknowledged level of intoxication and the fact that Appellant claimed he found her passed out on the bathroom floor, the Complainant's ability to consent could certainly be questioned. Or did some jurors believe one version and some the other? How can the State know what the jury thought?

It was entirely logical and proper for the jury – having clearly rejected the state's case, to have found a route through a thorough and proper reading of the charge to find a path to a conviction.

The Court of Appeals correctly applied the egregious harm standard.

The State incorrectly contends that defense counsel did not present the claim that Appellant engaged in oral sex with complainant as a defensive theory. The record is clear that when questioned by Detective Vessel, Appellant told him that he engaged in oral sex and then he also testified at trial to the same facts. It is hard to imagine a What further action could ? Further, the state's position that defense trial counsel argued that the jury should consider the lesser included is inaccurate. (State 16).

The State relies on a brief remark made by defense counsel wherein he tells the jury he believes Appellant to be not guilty, but the lesser included could be considered if they cannot agree. But even the next line allows for the possibility of any touching in a way that was offensive or provocative. (R.R. Vol. IV, 150-151).

Additionally, trial counsel argued as follows:

And they'll get up here and they'll say, well, you know, this is about consent. No. They're alleging that he stuck his penis in her vagina and he says he did not. (RR, 4, 142).

And:

Brian Reed got up here and waived his Fifth Amendment privilege and described to you what all went on that night and admitted he lied about things. (RR 4, 145).

And:

He violated the sanctity of their marriage, but he didn't violate the law. Now, you can sit here and say, well, she was intoxicated. He should have known better. Well, he should have, but that's not against the law unless she's passed out.(RR 4, 145).

The State's claim is that the defense abandoned the defensive theory regarding the oral sex. What does that really mean? The defense called Appellant to testify, elicited the testimony about oral sex and argued to the jury that he should be acquitted. Where is the abandonment?

Appellant invites this court to consider the evidence in regard to a possible charge of penetration of Complainant's vagina by Appellant's mouth through the prism of a sufficiency review. That is, to determine whether the body of evidence presented at trial was sufficient to support a jury finding Appellant guilty of either attempted or actual penetration by Appellant's mouth. Surely, this Court would have found the evidence sufficient. How then could there not be egregious harm in instructing the jury in a manner that would allow conviction for such version of the facts.

The State's reliance on *Castillo-Ramirez* in regard to evaluating harm is misplaced

The issue before this Court only involves a harm analysis. The State's reliance on *Castillo-Ramirez v. State*, No. 14-18-00514-CR (Tex. App. – San Antonio, Aug. 21, 2019, pet. granted), PD-1279-19, in arguing that there was no harm is misplaced. *Castillo-Ramirez* was cited by the defense for the San Antonio appeals court's holding that a charge not specifying what was used to penetrate the victim's anus was erroneous. This Court has

not granted review on that question, but rather on whether such error is harmful when there was no evidence presented at trial of penetration by anything other than Castillo's penis.

Whether the error was egregiously harmful must be determined by the specific facts of the case. The facts of this case are worlds apart from that before this court in *Castillo-Ramirez v. State*. In this case, Appellant both told the investigating officer the morning after the incident that he had performed oral sex and then testified at trial that he had performed oral sex on the Complainant.

CONCLUSION

The Court of Appeals correctly applied the egregious harm standard. As set out in Almanza, in determining egregious harm, an appellate court is to consider: 1) the entire jury charge, 2) the argument of counsel, 3) the entirety of the evidence, including the contested issues and the weight of the probative evidence, and 4) any other relevant factors revealed by the record as a whole. *Almanza v. State*, 686 S.W.2d 156, 171 (Tex. Crim. App. 1985); *Hollander v. State* 414 S.W.3d 746, 749-50 (Tex. Crim. App. 2013).

"Errors that result in egregious harm are those that affect "the very basis of the case,' 'deprive the defendant of a valuable right,' or vitally affect a defensive theory." *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005).

Appellant had a right to notice of the charge against him and to be tried only for the charged offense. The erroneous charge deprived him of those rights. The defensive theory was always that Appellant did not penetrate Complainant with his sexual organ but with his mouth. The erroneous charge vitally and negatively affected that defensive theory.

The Court of Appeals decided this case correctly. Discretionary review by this court is not warranted.

PRAYER

Wherefore, premises considered, Appellant asks this Court to refuse the State's petition for discretionary review and grant such other relief as this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Rule of Appellate Procedure 9.4(i)(3), the undersigned certifies that this computer generated contains 3328 words.

By: /s/ MARY HENNESSY
Mary Hennessy
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CERTIFICATE OF SERVICE

This is to certify that on November 30, 2020, a true and correct copy of the above and foregoing document was served on Douglas Howell, III, Brazos County Assistant District Attorney, dhowell@brazoscountytx.gov; and the State Prosecuting Attorney,

information@SPA.texas.gov. by eservice.

_/S/ MARY HENNESSY

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